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(4)

No. 95-912

Supreme Court, U.S.
FILED
JAN 29 1996

In The

Supreme Court of the United States

October Term, 1995

LEONARD HIATT, *et al.*,

Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation; UNITED TRANSPORTATION UNION,

Respondents.

JEROME SMITH, *et al.*,

Petitioners,

vs.

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware Corporation; UNITED TRANSPORTATION UNION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

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STATEMENT OF THE CASE

Petitioners hereby incorporate by reference their statement of the case in their original petition for review. (Petition for Writ of Certiorari, at 2-4).

FURTHER REASONS FOR GRANTING THE WRIT

I.

PETITIONERS HAVE ESTABLISHED A PROPER BASIS FOR REVIEW.

Both Respondents erroneously assert that there are no special and important reasons for granting Petitioners' writ of certiorari. (Union Pacific's [hereinafter UP] Brief in Opposition, at 8-10; United Transportation Union's [hereinafter UTU] Brief in Opposition, at 4-6).[1] In federal cases, the granting of a writ of certiorari is appropriate in instances where there is a split in the decisions of the circuit courts, where the circuit court has decided an issue in such a manner as to warrant this Court's exercise of its supervisory power, or where the circuit court has decided an issue upon which this Court should exercise its supervisory power. S. Ct. Rule 10(1)(a) and (c). These are not the only reasons for which this Court will grant a writ of certiorari, however; instead, they only "indicate the character of the reasons that will be considered." S. Ct. Rule 10(1). In any event, all of these grounds have been met in the instant case.

A. Respondents Altered the Seniority System So That It Was No Longer Bona Fide.

In this case, the Tenth Circuit held that the granting of

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1. Respondent Burlington Northern filed no statement of its position, but merely its counsel's entry of appearance.

summary judgment was appropriate because the Respondents were acting pursuant to a bona fide seniority system, and erroneously concluded that Petitioners were demanding to change this bona fide seniority system. (App. A, at 9a). Not surprisingly, this also is the argument of both respondents. (UTU Brief in Opposition, at 10; UP Brief in Opposition, at 4-5).

Union Pacific recognized that the seniority system was already changed. (UP Brief in Opposition, at 5). However, Union Pacific mischaracterizes the reason for the change by asserting that such change was required by Public Law 102-29. (*Id.*). In fact, Public Law 102-29 neither changed the seniority system nor required the seniority system to be changed. The seniority system was changed when the Respondents implemented Public Law 102-29 by eliminating the brakemen position, without eliminating the work of the brakemen, as required, but robbed the brakemen of their seniority which they had worked years to build when that was not required by Congress.

Here there is an important federal issue that needs to be decided. That issue is whether the Respondents can discriminate, on the basis of age, by hiding behind a law that neither requires nor sanctions the Respondents' discriminatory action. Since the law did not require stripping Petitioners of their seniority, it is wrong to allow Respondents' free rein to discriminate by hiding behind Public Law 102-29.

B. The Tenth Circuit Inappropriately Refused to Consider Petitioners' Unrebutted Evidence of Intentional Discrimination in Light of the Lack of Discovery.

The Tenth Circuit agreed with the district court that Petitioners "failed to offer any evidence that would permit a rational trier of fact to conclude that the Respondents' actions were a pretext for intentional and unlawful discrimination on the

basis of age." (App. A, at 11a; App. B, at 40a-41a). In fact, Petitioners presented substantial *unrebutted* evidence of intentional discrimination. (App. E, 129a, ¶ 5; 131a, ¶¶ 8-10; 400a-02a, ¶¶ 7-11; *see also,* 135a-396a, ¶¶ 8-9). Additionally, despite Union Pacific's statement that there is no disparate impact challenge to a bona fide seniority system, a disparate impact has long been viewed as relevant evidence pointing to intentional discrimination. *Cf,* UP Brief in Opposition, at 10; *Pullman-Standard v. Swint,* 456 U.S. 273, 289 (1982); *Harvey by Blankenbaker v. United Transp. Union,* 878 F.2d 1235, 1244 (10th Cir. 1989). Petitioners produced such evidence of discriminatory impact. (App. C, at 61(a); App. D, at 89(a)). Had discovery been allowed, Petitioners assert that the impact would have been even greater because the proper pool would have been to consider only those brakemen who had not previously accepted promotion to conductor. (App. E, at 130a, ¶ 6; 400a, ¶ 6).

C. A Significant Split in the Circuits Exist as to Whether the Disparate Impact Doctrine Is Applicable to Cases Arising Under the ADEA, Thus Granting Petitioners' Writ of Certiorari Is Appropriate.

The issue of whether the disparate impact doctrine applies in seniority challenges under Title VII has long been settled in the negative. *See Pullman-Standard v. Swint,* 456 U.S. 273 (1982); *American Tobacco Co. v. Patterson,* 456 U.S. 63 (1982); *International Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977). However, this Court has never decided the issue with respect to cases arising under the ADEA. (*See* App. A, at 8a). Significantly, the district court granted summary judgment, in part, upon the determination that the disparate impact doctrine is always inapplicable to cases arising under the ADEA. (App. B, at 43a - 58a). Thus, with this in mind, it is clearly appropriate for this Court to decide such an important issue.

This is especially so, given the fact that there is a considerable split among the circuits on this issue. *Compare MacPherson v. University of Montevallo*, 922 F.2d 766 (11th Cir. 1991); *Lyon v. Ohio Educ. Ass'n & Professional Staff*, 53 F.3d 135, 139-40 n. 5 (6th Cir. 1995); *Abbott v. Federal Forge, Inc.*, 912 F.2d 867 (6th Cir. 1990); *Holt v. Gamewell Corp.*, 797 F.2d 36,37 (1st Cir. 1986); *EEOC v. Borden's Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980), *with EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *DiBiase v. Smithkline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (arguing that disparate impact theory is not applicable to ADEA cases, but did not actually decide the issue). Such a split in the circuit clearly warrants the attention of this Court so that the ADEA may be applied in a uniform manner throughout this nation. *See* S. Ct. Rule 10.

United Transportation Union argues that review of this issue is inappropriate since the Tenth Circuit declined to decide this issue. (UTU Brief in Opposition, at 12). This argument ignores the fact that the Tenth Circuit's opinion was a final judgment in this case, and that this Court has discretion to decide issues raised before the appellate court but not decided. *See Patrick v. Burget*, 486 U.S. 94, 95 n.5 (1988); 17 Fed. Prac. & Proc. § 4036. Thus, this Court's review of this important issue is clearly appropriate.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit in this matter, since the court below, as well as the United States District Court for the District of Colorado made plain error in granting summary judgment in these actions without providing Petitioners the discovery they requested at the IPC and reiterated at oral argument on summary judgment, as noted by Petitioners in their petition for writ of certiorari. (Petition for Writ of Certiorari, at 7-9).

Respectfully submitted,

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